

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

RYAN COSTA,
Appellant

v.

G1-12-62

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

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Commissioner:

Cynthia A. Ittleman, Esq. ¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Ryan Costa (hereinafter “Mr. Costa” or “Appellant”), seeks review of the City of Brockton’s (hereinafter “Appointing Authority” or “City”), decision to bypass him for original appointment to

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

the position of permanent full-time firefighter in the Brockton Fire Department (hereinafter “BFD” or “Department”). A full hearing was held on June 21, 2012 at the offices of the Civil Service Commission. The hearing was digitally recorded and copies were forwarded to the parties. The parties submitted post-hearing briefs.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing (Joint Exhibits 1-13). Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Brian Nardelli, Deputy Chief, Brockton Fire Department

For the Appellant:

- Ryan Costa, Appellant
- Eric Maguire, Firefighter, Brockton Fire Department; owner of property located at 19 Candy Lane, Brockton, MA
- Katy Maguire, Wife of Eric Maguire; owner of property located at 19 Candy Lane, Brockton, MA
- Richard Costa, Captain, Brockton Fire Department; Appellant’s Father

And taking administrative notice of all other matters filed in the case and pertinent statutes, regulations and policies; a preponderance of the credible evidence establishes as follows:

1. The Appellant is a thirty-one (31) year old male who grew up on Bridgewater, MA. He entered the United States Air Force in October 2005 and was honorably discharged from active duty in October 2009. While enlisted in the Air Force, the Appellant was stationed at Travis Air Force Base in California. Military

records show both his home of record at time of entry and future address upon release from military to be Bridgewater, MA. (Exhibits 1, 4; Testimony of the Appellant)

2. In 2009, while on furlough from the military, the Appellant took the 2009 Police Officer examination. The Appellant gave Bridgewater as his residency preference. (Testimony of the Appellant)
3. After discharge from the military, the Appellant remained in California through the holidays, and then travelled across the country visiting family and friends. He returned to his parents' residence in Bridgewater, MA in late March of 2010. (Testimony of the Appellant)
4. At some time in late March of 2010, Richard Costa, the Appellant's father and a Captain in the Brockton Fire Department, held a party for the Appellant, at his home at 35 Amherst Avenue, Bridgewater, MA. Present at this party were Eric Maguire, a firefighter with the Brockton Fire Department and friend of Richard Costa, and Eric Maguire's wife, Katy Maguire, also a friend of the Costa family. Eric Maguire had worked directly under Richard Costa at the City of Brockton Fire Department. (Testimony of the Appellant, Richard Costa, Eric Maguire, Katy Maguire)
5. At this party, the Appellant, Eric Maguire and Katy Maguire discussed the possibility of the Appellant moving to their home at 19 Candy Lane in Brockton, MA. Subsequently, the Appellant moved in to the Maguires' home. Neither the Appellant, nor any of the witnesses for the Appellant, were able to

recall an exact date that the Appellant moved in. (Testimony of the Appellant, Richard Costa, Eric Maguire, Katy Maguire)

6. No rental agreement was drafted at any point during the Appellant's stay with the Maguires. Rent was paid in cash directly to Eric Maguire by Richard Costa. No receipts were given in return, and the payments were not memorialized in any way. The payments were not deposited in a bank by Eric Maguire. The payments were not reported to the IRS, although an amended tax return was filed at some later time. (Testimony of the Appellant, Richard Costa, Eric Maguire, Katy Maguire)
7. On April 24, 2010, the Appellant took the 2010 Firefighter Open Examination and did not indicate any residency preference, as he believed that he must have residency in a city/town for a period of one year prior to taking the examination. (Exhibit 2; Testimony of the Appellant)
8. Some months after taking the 2010 examination, the Appellant's father, Richard Costa, made the Appellant aware of Massachusetts Human Resources Division ("HRD") guidelines for establishment of residency for veterans returning home from the military and encouraged him to seek a dual residency preference in both Bridgewater and Brockton. Shortly thereafter, the Appellant contacted HRD, requesting residency preference to be established in Brockton. Although this request was initially denied and appealed, the City of Brockton eventually agreed to place the Appellant on the list with Brockton residency preference; the City reserving its right to conduct a routine background investigation, including residency. (Testimony of the Appellant)

9. The HRD Military Residence Exception provides that instead of having to reside in a city or town one full year prior to the examination, someone who is on active military duty on specific dates prior to the exam may establish residency preference nonetheless. Specifically, it provides that if an individual taking the Civil Service examination for the position of firefighter on April 24, 2010 entered active military service before April 24, 2009 and returned before the April 24, 2010 exam, the individual may claim residency preference in either the city or town of his residence at the time he entered active military duty, or in the city or town of his residence upon return from active military duty. Since G.L. c. 31, § 58 indicates that residency is established in the period prior to the exam, the HRD Military Residence Exception similarly requires residency to be determined prior to the April 24, 2010 exam. (Exhibit 3)
10. On October 28, 2011, the Appellant submitted to the Department his Recruit Background Investigation Form for appointment. After receipt of the Appellant's completed Background Investigation Form, the Department began the process of conducting a background investigation of the Appellant based on the information provided therein. (Exhibit 1; Testimony of Mr. Nardelli)
11. Section 14 of the Background Investigation Form asks applicants to provide information relating to their Civil Service history. (Exhibit 1)
12. Section 14(A) asks applicants to state whether or not they have ever applied for a Civil Service Examination except in the present instance. In response to this request, the Appellant answered "Yes" and stated that he had applied for the

2011 Police Officer Examination in Bridgewater, MA, and had not yet received results. (Exhibit 1)

13. Section 14(B) asks applicants to state whether they have ever been or are currently on any Civil Service List, in response to which the Appellant indicated “No.” (Exhibit 1)

14. At this time, the Appellant signed the “Recruit Background Investigation Form Personal History Statement” which states, “I understand that willfully withholding information or making false statements on this Background Investigation form or during my application Interview, will be basis for rejection or dismissal.” This statement is signed as witnessed by Deputy Chief Brian Nardelli. (Mr. Nardelli) (Exhibit 1)

15. As proof of residency, the Appellant was asked to submit as many documents as possible. The form specifically suggested utility bills, real estate bills, house deeds, voter registration, income tax records, bank statements, credit card statements, license to carry firearm, professional or occupational licenses, automobile registration, and automobile excise tax records. The Appellant submitted only two electronic bank statements showing residency at 19 Candy Lane in Brockton, MA. The statements were dated April 1 to April 30, 2010, and April 10 to March 10, 2010. Other documentation submitted to provide proof of Brockton residency was for a period of time after April 24, 2010. (Exhibits 6, 11, 12)

16. On or about November 9, 2011, the Appellant was interviewed by the City Recruit Selection Committee as part of the recruit hiring process. Present at the

Appellant's oral interview were the members of the Recruit Selection Committee, which included both Chief Richard Francis and Mr. Nardelli.
(Testimony of Mr. Nardelli)

17. Mr. Nardelli, a member of the Department for 16 years, conducted the background check. At the completion of the background investigation, Mr. Nardelli created a report to be submitted to Chief Richard Francis for review and to be used in making his final decision. (Testimony of Mr. Nardelli)
18. Mr. Nardelli discovered that the information provided by the Appellant in his application was not accurate, and also that information concerning the Appellant's Civil Service History had been omitted. Mr. Nardelli discovered that the Appellant failed to disclose that he had applied for the 2009 Police Officer Examination under Bridgewater residency preference and that the Appellant was placed on the Civil Service List for this position, receiving notice for an interview from the Town of Bridgewater on February 11, 2011. The Appellant was ultimately not selected for the position. (Exhibits 2, 7; Testimony of Mr. Nardelli)
19. As part of the background investigation, Mr. Nardelli conducted a canvas of the neighborhood surrounding 19 Candy Lane, Brockton, MA. Mr. Nardelli spoke with Norman Zaleski, who lived directly to the east of Eric and Katy Maguire at 11 Candy Lane. Mr. Zaleski stated that he knew Eric and Katy, but after being shown a photograph of the Appellant, did not know him. Mr. Nardelli testified that he also spoke with Chicki Labate, who lives across the street from the Maguires at 34 Candy Lane. Mr. Labate stated that he knew who the Maguires

were, but did not recognize the Appellant when shown a photograph. These neighbor interviews were memorialized in Nardelli's background report to the Chief. (Testimony of Mr. Nardelli)

20. As such, Mr. Nardelli found that the Appellant had not properly answered the residency and Civil Service history portions of the Background Investigation Form. (Exhibits 2, 7; Testimony of the Appellant, Mr. Nardelli)

21. The Appellant was bypassed by the City on January 3, 2012. The letter provided two reasons for the bypass:

a. "You failed to complete the background packet accurately and completely. The Appellant indicated "No" in the background packet as ever having been on any Civil Service list. You failed to include a 2009 Civil Service test and subsequent interview with the Bridgewater Police Department, which was based on his ranking due to residency preference in Bridgewater."

b. "You provided no viable proof of residency for the timeframe required: Information obtained during the background investigation failed to support the 19 Candy Lane, Brockton, MA address. Additionally, a 2011 Civil Service Examination for Bridgewater Police Officer was listed in the hiring packet, again indicating Bridgewater residency preference, not Brockton". (Exhibit 10)

22. On February 20, 2012, the Appellant submitted a document to the City, providing corrected answers to questions asked under Section 14A and 14B of the Background Investigation Form. (Exhibit 2)

23. The Appellant testified that he had completed the application as quickly as he could, but in doing so that he did in fact have time to review his responses before submitting the Background Investigation Form. The Appellant further testified that he had been confused when answering Section 14(A), and believed that he was being asked whether or not he had applied for a Civil Service position in the past, rather than whether he had applied for a Civil Service examination in the past. The Appellant testified that although he was asked about his Civil Service history during the oral interview, he was not directly informed that the information he had provided in his Background Investigation Form had been discovered to be inaccurate or incomplete. The Appellant testified that the corrected answer submitted on February 20, 2012, was after receipt of his bypass notification and at the advice of his attorney. (Testimony of the Appellant)
24. Mr. Nardelli testified that neither he, nor any member of his department, was contacted by the Appellant asking for clarification on any question. (Nardelli Testimony)

DISCUSSION

Applicable Civil Service Statutes and Rules

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence,

when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a Civil Service list. The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge, 43 Mass. App. Ct. at 304.

The Respondent’s Argument

The City argues that bypassing the Appellant was proper. It asserts two grounds for the bypass. First, the City asserts that bypass was justified because the Appellant failed to answer truthfully and completely regard his prior Civil Service history. Second, the City argues that the Appellant failed to provide adequate proof of residence.

The Appellant's Argument

The Appellant asserts that the documents and witness testimony he has provided are sufficient to find, by a preponderance of the evidence that he did reside in Brockton by the critical date of April 24, 2010. He further argues that any inaccurate information in his application packet was unintentional, due to ambiguous wording of the questions, or due to his limited time in filling out the application.

Analysis

Ordinarily, in order for an applicant for original appointment to the police force or fire force of a city or town to qualify for residency preference, the applicant must live in that city or town for "one year prior to the date of the examination". G.L. c. 31, § 58. For the purposes of Civil Service law, "... 'reside' is used to designate the physical location of the employee's house or other dwelling place." Doris v. Police Comm'r. of Boston, 374 Mass 443, 444 (1978). "Your residence ... is the place where you actually lived and intended as your permanent home. A temporary living place, such as... a relative's or friend's house or apartment, etc., is not a residence." Human Resources Division, Residency Preference Claim & Employment Location Selection Worksheet, <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/forms-and-labor-applications/exam-forms/residency-preference-claim-and-employment.html>.

HRD provides an exception to this requirement for individuals who have been on active military duty at certain times prior to taking the Civil Service examinations for police or firefighter positions. Specifically, the applicable exception here is in a document entitled, “Massachusetts Human Resources Division – Civil Service Unit, Information for Military Personnel Claiming Residency Preference for the 2010 Firefighter Entry Level Exam” (which is dated December 8, 2009) (hereinafter “HRD Military Residence Exception”). The City did not address the HRD Military Residence Exception with regard to the Appellant.

The critical date by which the Appellant must have moved in to 19 Candy Lane is April 24, 2010. While the Appellant, Richard Costa, Eric Maguire and Katy Maguire all assert that the Appellant moved in before April 24, none of them can recall the exact day. If the date of move in cannot be remembered, then no assertion that the Appellant moved in before April 24 can be credible.

While the Appellant has provided some evidence, the evidence before this Commission is not credible. The Appellant provided two bank statements with his application. However, the bank statements actually presented before this Commission are defective. The statements show dates of April 1 to April 30, 2010, and April 10 to March 10, 2010 respectively. However, both show a printout date of December 20, 2010, far after the critical date. The dates on these statements and the printed address thereupon are insufficient to show that the Appellant resided at that address before April 24, 2010. These statements show, and most, that the Appellant had changed his address *sometime* in that statement period. As such, the testimony and evidence presented by the Appellant does not support his assertion.

The spreadsheet, created by Richard Costa, is likewise problematic. I do not find this spreadsheet credible, as it lists, as it was stated in Richard Costa's testimony that rent was paid to Katy Maguire. This conflicts with previous testimony. Katy Maguire testified that she did not receive rent money for the Appellant from Richard Costa, and Eric Maguire testified that the money was paid directly to him in cash. Regardless, the spreadsheet offers no direct evidence as to the actual date that the Appellant moved in. It is not clear whether the spreadsheet was made contemporaneously with the expenses recorded therein, or if it is merely an after-the-fact reconstruction of expenses. Moreover, this arrangement was not memorialized, no receipts were issued for payments, and the income was not reported to the IRS by the Maguires in a timely fashion. As such, it fails to show that the Appellant had established Brockton Residency by April 24, 2010.

I am sensitive to the difficulties face by returning veterans. However, the quantum of evidence requested by the Appointing Authority to determine an applicant's residency is clearly much greater than what the Appellant provided. The application form specifically requests utility bills, real estate bills, house deeds, voter registration, income tax records, bank statements, credit card statements, license to carry firearm, professional or occupational licenses, automobile registration, and automobile excise tax records, but does not accept personal affidavits. While a returning veteran cannot be expected to have such a complete record, some credible evidence must be produced. Furthermore, Mr. Nardelli's investigation showed that neighbors did not recognize the Appellant as a resident of 19 Candy Lane. While certainly not conclusive, this further supports the Appointing Authority's position. As the Appellant did not produce evidence of residence at the time of application, and has been unable to prove his residence before this

Commission, the City had a sound and sufficient basis to find that he failed to credibly establish Brockton as his residence.

As to the second basis for the bypass, the Commission finds that the City has demonstrated a sound and sufficient basis for finding that the Appellant failed to fully disclose his Civil Service history. The Appellant does not dispute that his answers were inaccurate, but only claims that they were accidental. However, I do not find his assertion that the answers were the result of confusion credible. There is no ambiguity in the questions, and the Appellant made no attempts to seek clarification. The Appellant's assertion that the inaccuracies were the result of his lack of time in filling out the application is likewise unavailing; the third page of the application (Exhibit 1) put the Appellant on notice that failure to provide accurate answers could subject him to disqualification, and his signature on the final page confirmed that he answered all questions fully and truthfully. Further, the February letter correcting the mistakes does not serve to repair the omission, because the letter was not sent until the Appellant had already received the bypass letter. The letter was entirely untimely, and regardless, was not before the Appointing Authority at the time the decision to bypass was made.

Appointing Authorities must rely upon applicants to fill out forms fully and correctly. This Commission has been given no reason to believe that the inaccuracies in the Appellant's form were anything other than honest mistakes. However, the Appointing Authority's policy is to require complete and accurate answers. This policy is not unreasonable, and the inaccuracies were neither minor nor technical. Though the Appellant may feel that the result of this policy is harsh, the Commission finds that it is not unduly so. As such, I find that the Appointing Authority has shown by a

preponderance of the evidence that the Appellant failed to properly answer fully and accurately regarding his Civil Service history.

Given the inaccuracies regarding the Appellant's Civil Service history, and his failure to submit adequate proof of his residence, the Commission finds that the Appointing Authority had sound and sufficient reason to bypass the Appellant.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-12-62 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners) on June 13, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Galen Gilbert, Esq (for Appellant)

Larry C. O'Bryan, Esq (for Appellant)

Caitlin E. Leach, Esq (for Appointing Authority)

John Marra, Esq. (HRD)